No. 90-28

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WILLIAM C. NEWTON,
Petitioner,

v.

W.R. GRACE & CO. and DEL TACO CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

HOMER L. DEAKINS, JR.*
MARGARET H. CAMPBELL
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
3800 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-1300
Counsel for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether certiorari is warranted for the purpose of addressing an issue not presented by the decisions or the record in the case.

2. Whether exclusion of evidence which has no bearing on the knowledge or intent of the decision-maker conflicts with *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

LIST OF PARTIES

The following companies are the parents, less than wholly owned subsidiaries, and affiliates of W.R. Grace & Co. and Del Taco Corporation, which is a less than wholly owned subsidiary of W.R. Grace & Co.:

Creative Food 'N Fun Company; Del Taco Restaurants, Inc.; Grace Drilling Company; Grace Energy Corporation; Grace Environmental, Inc.; La Posta Recycling Center Inc.; AmmTrans; Axial Basin Ranch Company; Carbon Dioxide Slurry Systems L.P.; Colowyo Coal Company; Grace Cocoa; Grace/FlowDril Drilling; Grace Ventures Partnership I; Grace Ventures Partnership II; Hayden-Gulch West Coal Company; H-G Coal Company; Kascho Import-Export GmbH & Co. K.G.; Nippon Service Chemicals K.K.; Paramount Coal Company; Pursue Gas Processing and Petrochemical Company; Spartan Intrastate Pipeline System; Arral & Partners; AWI; Canonie Environmental Services Corp.; Dean & DeLuca Brands, Inc.; Denka Grace K.K.; Dunbee-Elm Ltd.; FlowDril Corporation; Fuji-Davison Chemical Ltd.; Grace-Sierra Horticultural Products Company; Homco Trinidad Ltd.; Incacao Fabrica Nacional de Elaboradoes de Cacao S.A.; Intercoa, S.A.; Lemmon Company; Mountainview Insurance Company; Neue Transvac Maschinen A.G.; Nippon Belt Kogyo Kabushiki Kaisha; Productos Derivados de la Sal; Productora de Papeles S.A.; Rexim Lebensmittel Import und Export GmbH & Co., K.G.; Rexim Lebensmittel Produktion Beteiligungs, GmbH; Sea Oil Homco Limited; TAG Pharmaceuticals, Inc.; Teroson Kabushiki Kaisha; Thomsen Verwaltungs, GmbH; Trinidad Nitrogen Co., Limited; Wilhelm I Schmidt K.G.

All other parties in this matter are set forth in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-28

WILLIAM C. NEWTON,

Petitioner,

v.

W.R. GRACE & CO. and DEL TACO CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, W.R. Grace & Co. and Del Taco Corporation, oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the court of appeals, No. 87-8961, is unreported. It is reprinted in the Appendix hereto.[1]

---

[1] The opinion of the court of appeals is reprinted in an Appendix to this brief because there have been material deletions from the opinion in the version contained in the Petitioner's brief.

References to the opinion below are designated by "App.," followed by the appropriate Appendix page number. References to the record below are designated by "R," followed by the appropriate volume number (*e.g.*, R1) and document number (*e.g.*, R1-3). Ref-

JURISDICTION

The court of appeals entered judgment on May 24, 1989, affirming the grant of a directed verdict by the trial court. The court of appeals denied petitioner's petition for rehearing on April 6, 1990. This Court has jurisdiction of this matter under 28 U.S.C. § 1254(1) (1988).

STATEMENT OF THE CASE

The Respondent Del Taco Corporation (Del Taco), a subsidiary of W.R. Grace & Co. (Grace), hired the Petitioner William C. Newton (Newton) in 1978, at age 48, to be Director of Purchasing (R5-64, 137). Newton was promoted to Vice-President of Purchasing in 1981 (R5-78).

For a period of years continuing to 1982, Del Taco had suffered substantial losses, and Grace was considering selling or closing Del Taco (R5-230, 247-48). The unsuccessful management philosophy in place at Del Taco at that time, to which Newton subscribed, emphasized a tightly controlled, centralized management which opposed franchising (R5-67, 248, 250; R6-381-82, 443, 445-46).

In late 1982, Grace decided to create a Fast Food Division, with a management team headed by Louis Neeb (Neeb), to redeploy Del Taco's assets (R6-375-78). Vested with complete discretion in how to build Grace's fast food restaurant business, Neeb assembled a management team of new and existing Del Taco personnel, whom he directed to shift the focus of the business to operations and the consumer (R6-378-79). Neeb also began to reconfigure the Del Taco concept and franchise

---

erences to the transcript of the trial are designated by "R," followed by the appropriate volume number and page number(s) (*e.g.*, R6-433-35). References to the transcript of the deposition of Paul Puryear, which the jurors viewed on videotape and which was not transcribed by the trial court reporter (R6-474-75), are designated by "Puryear," followed by the appropriate page number(s).

it, and he acquired another restaurant concept and franchised it as well (R6-379-80; Puryear-7-8). Neeb's management philosophy emphasized a decentralized management structure, with management by consensus with substantial input from the operations in the field, which represented a fundamental change in Del Taco's philosophy and direction (R6-382, 445; R7-534-35). Consequently, the non-operations staff positions, such as purchasing, changed dramatically, becoming accountable to the operations personnel as well as to upper management (R6-445).

Shortly after Neeb and his upper management team, Dick Rivera and Paul Puryear, began working with Newton, they began to observe serious problems with his performance, and to receive complaints about him from operations people within Del Taco and from outside suppliers and others in the industry.[2] The internal complaints included reports that Newton changed suppliers and product specifications without approval, failed to communicate with operations and respond timely to the requests and needs of operations, lacked credibility with operations, failed in executing new openings and programs, and failed in developing new products (R6-384, 387-89, 447-53; R7-483-87, 496-500, 538-51, 564-65; Puryear-18, 19-21, 22-24, 26).

The supplier complaints included reports that Newton threatened to break executed contracts if suppliers did not change their terms, and that Newton attempted to discover the proprietary process of a supplier in direct violation of an agreement—of which Newton was aware—between the supplier and Del Taco (R6-389-90, 396-99, 421, 453-54, 454-56; R7-502-04, 576-78, 589-92). In addition, the president of another regional fast food chain who was active in improving relationships between sup-

---

[2] The managers' direct observations are not at issue in the question on which the Petitioner seeks the writ. Accordingly, the Respondent will not detail them in this brief.

pliers and purchasers in the industry told Neeb that Newton had a reputation for shopping sealed bids and "whipsawing" suppliers to get a lower price (R6-390).

Newton's superiors counseled with him and took measures to assist him in improving his performance (R6-385-88, 391-92, 456; Puryear-17-18, 21-24, 27). Despite these measures, Newton did not improve. Neeb and Newton's direct superiors met with Newton in December, 1983, and discussed his unsatisfactory performance and their concerns that his problems, if uncorrected, would make him unable to fulfill the growing responsibilities of his position (R6-394, 399-400, 457-58; Defendants' Exhibit 2).

Newton made no improvement over the next month, and management decided, based on Newton's past unsatisfactory performance and their belief that he would not be able to perform satisfactorily in the larger job, to terminate his employment (R6-402, 459-60, 488; Puryear-28-29). Specifically, Neeb cited Newton's inability to work with existing management, as evidenced by internal complaints; Newton's dealings with others which reflected negatively on Del Taco, as evidenced by supplier and industry complaints; and other conduct which Neeb or Newton's other superiors observed directly (R6-433-35). Newton was terminated at age 54, and replaced by a person who was 42 years old (R5-91; R7-612-13).

Newton filed an administrative charge of discrimination and a subsequent lawsuit on which the present petition is based. Newton claimed that he was terminated because of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1967).

The matter came on for a jury trial on October 29, 1987. The trial lasted five days, during which the parties compiled an extensive record of testimony and documentary evidence. At the close of Newton's case on November 2, 1987, Grace and Del Taco moved for a di-

rected verdict (R6-365-67). The trial court denied the motion at that time, noting, however, that any inference of age discrimination was weak and was undermined by evidence in Newton's case in chief that the reason for his discharge related to differences in the management philosophy of Neeb and his predecessor, to whose philosophy Newton subscribed (R6-368-71).

The defendants presented their evidence, including testimony and documents pertaining to the complaints made to Newton's superiors about him. Each of the individuals who testified, including current and former employees and supplier representatives, was cross-examined about the complaints.

After the defendants presented their evidence, Newton presented his rebuttal, during which he denied any wrongdoing and testified as to his version of the facts and incidents underlying the internal and supplier complaints on which his superiors relied in deciding to terminate him. Newton did not dispute that the complaints were made. He offered no evidence that his superiors had any reason to believe the complaints were false. He offered no evidence that the complaints were so inconsequential that they could not have formed the basis for the decision to terminate him. Instead, Newton proffered only testimony of his knowledge, not the decision-makers' knowledge, of how or whether the events occurred. Despite repeated direction by the trial court that he must offer evidence that went to the decision-makers' knowledge and intent, Newton never did so, and the trial court finally ruled that Newton could not offer further testimony which reflected only his knowledge or version of events to prove that the defendants' reliance on the complaints was a pretext for discrimination (R7-707-11, 720, 721-23). The trial court did not exclude any other evidence or testimony proffered by the plaintiff about his performance or the complaints or the events underlying them (App. 6a n.3).

At the close of all the evidence Grace and Del Taco renewed their motion for a directed verdict (R7-746-50). The trial court granted the motion, finding that the evidence was undisputed that Grace and Del Taco in fact received complaints about Newton's performance and based their decision to discharge him on those complaints and on his superiors' dissatisfaction with his performance. The court found that there was no evidence that Grace and Del Taco had any reason to believe the complaints were false or that the complaints were of such an inconsequential nature that they could not support the termination (R7-753-56). The trial court entered judgment in favor of Grace and Del Taco.

The court of appeals affirmed the trial court's grant of a directed verdict (App. 2a). The court of appeals held that "the objective correctness of the factual basis for the suppliers' complaints is legally irrelevant. Instead, the employer's good faith belief and motive in relying upon the suppliers' evaluation is legally relevant." (App. 7a) (footnote omitted). The court of appeals noted that "Newton's testimony regarding whether suppliers' complaints were objectively justifiable or not simply does not assist in determining whether Grace's motive in terminating Newton was discriminatory." (App. 7a n.4).

SUMMARY OF THE ARGUMENT

Newton has characterized the single "question presented" in his petition as whether "the Burdine rule . . . allow[s] a plaintiff to attack the employer's factual basis to prove pretext." (Petition at p. 2). The question does not articulate any reason of the character which would warrant this Court's exercise of its discretion to grant certiorari.

First, the question as stated, and as expanded in the petition, is not raised by the record in the present case. The "factual basis" for Newton's discharge, in relevant part, was his superiors' reliance on complaints they re-

ceived. Newton was not precluded from offering any evidence on that issue. Indeed, the trial court repeatedly directed him on exactly how to "attack the factual basis" in that regard. The only evidence excluded was Newton's extended testimony on his exclusive knowledge or beliefs about the objective correctness of the complaints. That was the only evidentiary exclusion issue preserved and challenged on appeal. As the trial court ruled and the court of appeals affirmed, such evidence does not go to the "factual basis" for the discharge or the proof of pretext as defined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), in the absence of any evidence indicating that Grace and Del Taco's reliance on the complaints was other than in good faith. The record shows that the trial court did not exclude any other evidence offered by Newton pertaining to his performance. Accordingly, the petition does not present a proper basis for certiorari, and the writ should therefore be denied.

Second, the decision below is not in conflict with *Burdine*, as the Petitioner claims in his jurisdictional statement (Petition at p. 6). *Burdine* sets forth the method by which a plaintiff may prove intentional discrimination in the face of the defendant's production of a legitimate, nondiscriminatory reason for the employment action. The proof must show that the specific reason is a pretext for discrimination, either directly or, of relevance here, "indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. Such proof implicates the employer's motive, which is the critical element of an intentional discrimination case. An employer can only be motivated by that which he knows. It is axiomatic that an employer's explanation cannot be proven unworthy of credence, and his motive illegal, if the employer had no knowledge that the facts underlying his reason were other than what he believed them to be. A good faith belief that complaints were true, and reliance thereon, cannot be attacked by evi-

dence that the complaints were false. *Burdine* does not require a court to admit such evidence, and the opinion below is not in conflict with *Burdine*. Accordingly, the writ should be denied.

ARGUMENT

I. THE PETITION RAISES A QUESTION NOT PRESENT IN THIS CASE

Newton argues in his petition that the courts below erred by preventing him from "attacking the factual basis" for his discharge, in contravention of this Court's requirement established in *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 258, "that the plaintiff be afforded a 'full and fair opportunity' to demonstrate pretext." This question is not, however, presented on the decision or record in the case below. First, the trial court's exclusion of evidence was not the broad exclusion Newton has characterized in his petition. Second, the exclusion did not preclude Newton from attacking the factual basis of the employer's decision. Accordingly, certiorari is not warranted.

Newton asserts generally throughout his petition that the trial court prevented him from introducing testimony about his good job performance. Newton has strayed from the record and from the issues he appealed to the Eleventh Circuit Court of Appeals, the only issues on which he may seek a writ of certiorari, by expansively characterizing the evidence exclusion. *See generally, Husty v. United States*, 282 U.S. 694, 701-02 (1931) (Petitioner not entitled to review of evidentiary rulings not raised as error before court of appeals). The trial court did not exclude any evidence other than the plaintiff's extended testimony of his versions of the complaint incidents. Newton's broader characterization of the exclusion is wholly unsupported by the record. In fact, the record shows that the court permitted Newton to introduce evidence, including his own subjective, con-

clusory opinions and the testimony of other supplier representatives, about his performance.

The trial court's ruling, the issue appealed to the Eleventh Circuit, and the court of appeals' holding were limited to the exclusion of Newton's extended testimony about his exclusive knowledge of the facts underlying the complaints to his managers. To the extent that Newton attempts to obtain review on a much broader alleged exclusion of evidence, there is absolutely nothing in the record below which presents the question, and certiorari is unwarranted. *United States v. Rimer*, 220 U.S. 547, 548 (1911); *accord*, *Needleman v. United States*, 362 U.S. 600 (1960); *McCullough v. Kammerer Corp.*, 323 U.S. 327, 329 (1945).

Even if the Court were to reframe Newton's question as limited to the actual, narrow evidence exclusion, the record also fails to present the question whether that exclusion prevented Newton from attacking the factual basis for his discharge. The factual basis for Newton's discharge, in relevant part, was his superiors' reliance on the complaints they received. The record clearly shows that the trial court not only permitted Newton to challenge all evidence offered by Grace and Del Taco of their receipt of, belief in, and reliance on the internal, supplier, and industry complaints, but also repeatedly instructed Newton on the types of testimony and evidence he could offer to "attack the factual basis" for his discharge. (R7-707-11, 720, 721-23).

The court of appeals affirmed the trial court's ruling, specifically holding that Newton could attack the defendants' proffered reasons and thereby prove pretext.

> He could have shown that Neeb, Rivera, and Puryear did not receive the suppliers' complaints, had reason to believe the complaints were false, or fabricated the complaints. He could also demonstrate that the nature of the complaints was so inconse-

quential that they could not have formed the basis for the termination decision.

(App. 8a).

Thus, the ruling of the trial court and the holding of the court of appeals did not prevent Newton from attacking the factual basis for his discharge. Newton's proffered evidence went instead to the objective correctness of the complaints, which is "legally irrelevant" to the proof of pretext (App. 7a). Simply stated, this case does not warrant a grant of certiorari because the record does not present the question whether the trial court's exclusion of evidence prevented Newton from proving pretext. Accordingly, certiorari should be denied.

II. THE DECISIONS BELOW ARE NOT IN CONFLICT WITH *BURDINE*

Newton argues that the decisions of the courts below are in conflict with *Burdine*, and that certiorari is therefore appropriate. The record amply demonstrates, however, that the decisions below are not in conflict with *Burdine* or the decisions from other courts of appeals cited by the Petitioner.[3] Indeed, the decisions below are entirely consistent with *Burdine*.

As set forth above, the only question of evidence exclusion on which Newton can seek review is the exclusion of his extended testimony about his exclusive knowledge and his version of events and facts underlying the complaints to his superiors on which they relied in deciding to discharge him. Because that evidence had no bearing on the employer's knowledge or intent, it was "legally

---

[3] The alleged conflict between the opinion below and those of other circuits which the Petitioner cites does not exist on the only issue properly before the Court. None of the alleged conflicting decisions has anything to do with the evidence exclusion issue in the present case. The decisions cited are simply and primarily general analyses of the *Burdine* order and burdens of proof.

irrelevant" to the issue of pretext, and the trial court's exclusion of it, which the court of appeals affirmed, did not deprive Newton of any opportunity required under *Burdine*.

Discrimination, in the context of this case, is an intentional act. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. at 253, 256. In order to prevail, a plaintiff must establish, directly or indirectly, the employer's discriminatory intent or motive. *Id.* at 256. In the face of a defendant's articulation of a legitimate, nondiscriminatory reason for its conduct, a plaintiff may prove discriminatory motive by direct evidence, or "by showing that the employer's proffered explanation is unworthy of credence." *Id.* The plaintiff's proffer of pretext evidence must, however, address the employer's specific explanation. *Id.* at 255. Thus, evidence which does not impeach that specific explanation has no value in proving pretext, because it offers the trier of fact no assistance in determining whether the employer's motive was discriminatory (App. 7a n.4).

As the court of appeals held in the present case, where the employer's proffered explanation for an employment action is its reliance on complaints about the employee's performance, evidence that the complaints were erroneous has no value in proving pretext, absent proof that the employer knew or had reason to believe the complaints were false (App. 7a). The plaintiff may attack the employer's good faith belief in the complaints by showing the employer knew or had reason to know they were false, but alleged facts which cannot be shown to have been known to or suspected by the employer have no effect on the employer's good faith belief (App. 7a n.4).

The trial court's ruling, affirmed by the court of appeals, is consistent with the well-settled rule that an employer's reliance on erroneous information is not proof of pretext if the employer relied on the information in good faith (App. 7a). *Moore v. Sears, Roebuck & Co.*,

683 F.2d 1321, 1323 n.4 (11th Cir. 1982). *Accord, e.g., Weihaupt v. American Medical Association*, 874 F.2d 419, 429 (7th Cir. 1989) ("self-interested assertions" by plaintiff of his ability do not prove employer's good faith assessment of his skills, even if mistaken, pretextual); *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989) (action taken on honest belief of misconduct, even if erroneous, not discriminatory); *Bechold v. IGW Systems, Inc.*, 817 F.2d 1282, 1285 (7th Cir. 1987) (honestly held belief, even if unreasonable, not discriminatory); *Snyder v. Washington Hospital Center*, —— F. Supp. ——, 36 FEP Cases 445, 447 (D.D.C. 1984) ("the truth of the complaints received is not at issue"); *Williamson v. Owens-Illinois, Inc.*, 589 F. Supp. 1051, 1057-58 (N.D. Ohio 1984), *affirmed in part without opinion*, 782 F.2d 1044 (6th Cir. 1985) (inquiry on pretext is whether management's perception of employee is credible and reasonable, not whether it is factually true); *Franklin v. Greenwood Mills Co.*, —— F. Supp. ——, 33 FEP Cases 1847, 1855 (S.D.N.Y. 1983) ("plaintiff's evidence that [his employer] treated him unfairly and made assessments of his abilities based upon inaccurate information . . . is fundamentally misdirected"). *Burdine* does not conflict in any respect with this rule.

The court of appeals below articulated clearly that the evidence Newton proffered, which did not in any way implicate the knowledge or intent of Del Taco or Grace, was irrelevant to the proof of pretext. The record evidence is undisputed that the complaints were made, that Newton's superiors considered them serious and believed them to be true, and that they relied on them in discharging Newton. In order to attack this proof with evidence relevant to the pretext issue, Newton could have proffered evidence that any one of those facts was not true. The trial court repeatedly advised and directed him to do so. Instead, Newton persisted in offering only further testimony pertaining to his exclusive knowledge

of how or whether the events occurred. That evidence had no bearing on what the decision-makers knew, and the trial court properly exercised her discretion to exclude it as irrelevant to the pretext issue.

There is simply no conflict between the decisions below and *Burdine*. The action of the trial court, affirmed by the court of appeals, did not deprive Newton of a full and fair opportunity to prove pretext. The present case does not, therefore, raise any issue which warrants the issuance of a writ of certiorari. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

HOMER L. DEAKINS, JR.*
MARGARET H. CAMPBELL
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
3800 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-1300
Counsel for Respondents

* Counsel of Record

APPENDIX

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8961

D. C. Docket No. 85-4725

WILLIAM C. NEWTON,
Plaintiff-Appellant,

versus

W.R. GRACE & COMPANY and DEL TACO CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(May 24, 1989)

Before HATCHETT and CLARK, Circuit Judges, and FITZPATRICK*, District Judge.

CLARK, Circuit Judge:

Appellant William C. Newton (Newton) seeks reversal of the district court's directed verdict for the defendants.

---

* Honorable Duross Fitzpatrick, United States District Judge for the Middle District of Georgia, sitting by designation.

The district court directed a verdict in favor of the defendants because Newton failed to establish his case and the defendants had just cause to replace him. We have carefully reviewed the record in this case, the parties' briefs, and the applicable law. We affirm.

Newton sought relief under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, which protects employees from unlawful discharge by reason of age. The statute protects individuals who are at least 40 years of age but less than 70. Del Taco Corporation, a subsidiary of W.R. Grace & Co., employed Newton in September, 1978, as its first Director of Purchasing. In 1981 he was promoted to Vice President in charge of purchasing, but was discharged in February, 1984, at the age of 54. Newton's replacement was 41 years of age. Thus, both Newton and his replacement are within the prescribed age range.

Newton's case was based on a theory that in September 1982 the defendants Del Taco and Grace started a "youth movement" when Louis Neeb, 43 years old, was hired to head and assemble a new management team.[2] Del Taco had been losing large sums of money and Neeb, an experienced fast food business executive, was hired to reverse that situation. In November 1982, Neeb fired Richard Hynan, age 43, and Newton's supervisor, and replaced him with Richard Rivera, age 36.

Del Taco's profitability increased during the new management team's first two years. During this time, however, Neeb received complaints about Newton from Del Taco operations employees and outside suppliers. The gist of the complaints was that Newton lacked credibility in his ability to perform his job or was heavy-handed in his dealings with suppliers. Neeb also claimed that he had discovered that Newton had overstocked obsolete in-

---

[2] Neeb also directed the acquisition and franchising of T.J. Applebee's, a restaurant chain.

ventory and made a major miscalculation in estimating food costs.

On December 8, 1983, Newton met with Neeb and Rivera ostensibly to discuss the possibility of Newton becoming a Del Taco franchisee. Neeb and Rivera, however, did not discuss a franchise but instructed Newton to work more closely with two operations directors: Bill Palmer, the founder of and director of operations for T.J. Applebee's, and Bill Glennon, the southeast district manager for Del Taco. Newton was also instructed to work more closely with a third person named Sharp, an architect with T.J. Applebee's.

A second meeting was held on January 12, 1984 during which Newton was again instructed to work closely with Palmer and Glennon. Neeb then changed Newton's direct supervisor from Rivera to Paul Puryear, the chief financial officer of Del Taco. Puryear stated he continued to receive complaints about Newton and made numerous attempts to change Newton's business behavior.

A third meeting, this time with Neeb and Puryear, was held on February 12, 1984. Newton was told he was fired because he was not working well with others in the company, specifically Palmer and Glennon. Newton remained in his position until his replacement, 41 year old Jim Barnett, arrived. Newton was 54 years old at this time. Following his dismissal, Newton receive a letter of recommendation from Neeb.

Appellant weakly argues that the district court erred in directing a verdict against him, stating:

> Even if the district court correctly directed a verdict in favor of Grace based on the evidence admitted at trial, Newton should be granted a new trial because the district court's errors in denying pre-trial discovery and excluding key evidence at trial denied Newton "a full and fair opportunity to demonstrate pretext."

Appellant's Reply Brief at 2. The district court was correct in directing a verdict because Newton failed to prove that he was the victim of a "youth movement" as alleged in his lawsuit. His proof did not go beyond showing that he was a member of a protected group, he was discharged, he was replaced by a younger man, and he was qualified for the position he had been holding. Newton's asserted prima facie case was weak because he was only 54 when discharged and his replacement was 41 (within the protected group). As discussed in *Pace v. Southern Ry. System*, 701 F.2d 1383, 1389-90 (11th Cir. 1983), a plaintiff must ordinarily show something more. This is certainly true here where the defendants presented evidence to support just cause for discharging Newton, which evidence was largely unrebutted.

The gravamen of Newton's appeal is that the district court erred in not allowing him discovery to attempt to prove a statistical pattern of age discrimination by the defendants in years prior to Neeb's arival in 1982. Newton's principal contention is that the district court erred in denying his motion to compel because a comparison of pre-Neeb period data with Neeb period data may indirectly support an inference that officials on the Neeb management team engaged in age discrimination. Grace counters that information tending to show age discrimination during the pre-Neeb period is not relevant and that disclosure of pre-Neeb data is burdensome because the information was not computerized.

A revie wof the record fails to establish that the exclusion of pre-Neeb period data prejudiced Newton's case. In particular, Newton's reliance upon *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493 (11th Cir. 1987) to support his position is misplaced. In *Rosenfield*, the plaintiff, a terminated national accounts manager, introduced evidence that the ages of the employer's national account managers "changed markedly" following a management change. In particular, the five new incom-

ing accounts managers were over ten years younger than the terminated plaintiff. On appeal, the count stated that this evidence "is exactly the sort of indirect evidence which creates an inference that age was a determining factor in the discharge." 827 F.2d at 1497. Thus, *Rosenfield* stands for the unremarkable proposition that statistical evidence showing that an employer terminated older employees and replaced them with much younger employees during a particular time period is indirect evidence of age discrimination.

Rosenfield, however, does not help Newton's position. As in *Rosenfield*, Newton had the opportunity to present statistical evidence that Grace terminated older employees and hired younger replacements following the arrival of the Neeb management team. The record establishes that Newton had employment data (or access to such data) relevant to the Neeb period but failed to compile and present such data at trial. Newton nevertheless argues that his inability to present comparisons of pre-Neeb period and Neeb period data unfairly prevented him from showing pretext. Newton's argument must fail.

Statistical evidence regarding terminations during the pre-Neeb period is relevant as a benchmark for comparison with Neeb period statistics. This statistical comparison, however, lacks evidentiary significance if the Neeb period data itself lacks independent statistical significance. Newton presumably presented no statistical evidence relating to the Neeb period because such evidence did not support an inference of a "youth movement." Thus the statistical evidence regarding the pre-Neeb period is not relevant. Even if there had been statistical evidence of age discrimination against management employees between 1978 and 1982 prior to Neeb's arival, this could not help Newton. That would be evidence against Neeb's predecessor and could not demonstrate Neeb's policy. It makes little sense to require the disclosure of pre-Neeb period data for comparison with

Neeb period data when the latter's evidentiary value is itself minimal or non-existent.

The record establishes that Newton acquired or had access to employment data for the Neeb period. The fact that Newton failed to present Neeb period statistics in support of his claim demonstrates that he has suffered no prejudice and was not denied a full and fair opportunity to demonstrate pretext. We therefore hold that the district court did not abuse its discretion in denying Newton's motion to compel discovery.

Newton also asserts that the district court abused its discretion in excluding Newton's testimony regarding his version of the events underlying the suppliers' complaints that led to his termination.[3] Newton urges that his testimony would have demonstrated that the accounts of the complaints from suppliers to Neeb, Rivera, and Puryear were false. He asserts that he must be permitted to enter evidence that discredits Grace's explanation for his dismissal. *Texas Department of Community Affairs. v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1087, 1096, 67 L.Ed.2d 207 (1981) (plaintiff must be given "full and fair opportunity to demonstrate pretext").

Grace argues that Newton's testimony regarding the objective correctness of events underlying the suppliers' complaints is not relevant in demonstrating that Grace's actions were a pretext for age discrimination. Grace asserts that where an employer's articulated reason for dismissal is that he relied on outside suppliers' complaints, the employer need only show that he believed the complaints were true, not that they were objectively correct.

Grace's position is persuasive. In *Moore v. Sears, Roebuck & Co.*, 683 F.2d 1321 (11th Cir. 1982), this court stated that:

---

[3] The district court did not exclude the testimony of any witnesses, other than Newton, regarding the events underlying the suppliers' complaints.

> It is well settled in employment discrimination cases such as this that for an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith *believed* plaintiff's performance to be unsatisfactory and that the asserted reason for the discharge is therefore not a mere pretext for discrimination.

Id. at 1323 n.4 (emphasis in original) (citing *Burdine*). Thus, *Moore* supports the proposition that an employer's good faith belief in outside suppliers' complaints about an employee's performance is not a basis for liability. For example, an employer who terminates an employee based on a supplier's erroneous complaint does not engage in unlawful age discrimination provided the employer had no basis for disbelieving the supplier's evaluation. In such a case, the objective correctness of the factual basis for the suppliers' complaints is legally irrelevant. Instead, the employer's good faith belief and motive in relying upon the suppliers' evaluation is legally relevant.[4]

---

[4] An age discrimination plaintiff must present direct or indirect evidence relevant to the issue of the employer's motive in terminating the plaintiff.

> Evidence that casts doubt on the credibility of an employer's articulated reason for an employment decision is relevant only in the sense that it detracts from the likelihood that the employer's proffered motive was the true motive. Once the proffered motive is discredited, it leaves open the entire universe of other possible motives. In order to prove by a preponderance of the evidence that intentional age discrimination was the employer's true motive, the plaintiff would still have to present direct or indirect evidence tending to prove the existence of that illegal motive.

Milone, *Age Discrimination: Proving Pretext under the ADEA*, 13 Emp. Rel. L.J. 105, 115 (1987). Newton's testimony regarding whether suppliers' complaints were objectively justifiable or not simply does not assist in determining whether Grace's motive in terminating Newton was discriminatory.

Further, Newton's attempts to litigate the factual basis for the suppliers' complaints would unnecessarily protract already lengthy trial proceedings. Newton had other routes by which he could prove that Grace's articulated reasons for dismissal were a pretext for age discrimination. He could have shown that Neeb, Rivera, and Puryear did not receive the suppliers' complaints, had reason to believe the complaints were false, or fabricated the complaints. He could also demonstrate that the nature of the complaints was so inconsequential that they could not have formed the basis for the termination decision. He, however, can not simply litigate the factual basis underlying each event upon which outside suppliers' based their complaints through his own testimony regarding such events.

CONCLUSION

The district court was correct in denying Newton relief in this case. His age case was weak to start with. There is no indication that plaintiff was the victim of a "youth movement" on the part of the employer. The employer made a rather strong case that Newton was unable to work with his supervisors and colleagues on the management team and that this was the reason for the discharge.

AFFIRMED.